STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	)	
	)	
	)	ICC Docket No. 16-0259
Annual Formula Rate Update and	)	
Revenue Requirement Reconciliation	)	
Under Section 16-108.5 of the Public	)	
Utilities Act	)	

REPLY BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS BY ATTORNEY GENERAL LISA MADIGAN

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The People of the State of Illinois, by Attorney General Lisa Madigan ("the People"), submit this Reply Brief addressing the revenue that will be collected from Commonwealth Edison Co. ("ComEd" or "the Company") consumers in calendar year 2017. The People will respond to ComEd's arguments that the Commission cannot review its programs and spending on voltage optimization ("VO") and data analytics. The People further respond to ComEd's attempt to charge consumers for the $2.2 million it paid out to settle a complaint that it violated the federal Telephone Consumer Protection Act when it sent out unsolicited texts to consumers across its service territory.

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A. Overview

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1. Voltage Optimization. ComEd Ignores Substantive Evidence Provided in AG Exhibits 2.0 and 4.0 Demonstrating That Its Voltage Optimization Study Fails to Address Major VO Issues.

ComEd makes an essentially inconsistent argument by suggesting that the People cannot challenge the prudence and reasonableness of ComEd's projected spending on VO while at the same time arguing that its witnesses established the prudence and reasonableness of that very same projected spending. As set out in the People's Initial Brief at 4-5, Section 16-108.5 (d) clearly authorizes the Commission to review the prudence and reasonableness of expenses included in the rate year revenue requirement. While ComEd witnesses attest to the "prudence and reasonableness" of ComEd's spending, other parties are also authorized to offer testimony on those issues.

ComEd asserts that "the purpose of this proceeding is to review ComEd's 'updated cost inputs to the performance-based formula rate for the applicable rate year and the corresponding new charges.' (220 ILCS 5/16-108.5(d)." ComEd then implies that because the People did not propose a specific adjustment, they are barred from reviewing the prudence and reasonableness of ComEd's spending. However, the costs that Messrs. Fagan and Chang reviewed are *projected* costs that will be reconciled in 2018. The ultimate costs subject to recovery after reconciliation may be different from the costs allowed in this docket. The concerns raised about the reasonableness and prudence of ComEd's VO spending are necessary to provide the Commission with information when the final costs are presented for recovery. ComEd benefits from this

advanced notice of potential prudence issues in connection with its approach to VO and to the validation study. In addition, as a result of the evidence and objections contained in this record, ComEd cannot argue in the reconciliation that prudence and reasonableness concerns were somehow waived.

ComEd further argues that the People's witness "do not state, apply, or evaluate the established legal standards for determining prudence." ComEd Initial Brief at 15. This should not be surprising. Messrs. Fagan and Chang are not lawyers. They investigated and evaluated ComEd's VO plans and existing practices in light of the $4 million in projected plant ComEd seeks to recover in 2017 rates. Their factual evaluation allows the Commission to apply the legal standard for prudence and reasonableness in this case and in the future when the projected validation study is presented as an actual cost in reconciliation.

ComEd notes that prudence means: "the 'standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made.' *E.g., Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 435 (5th Dist. 2003); *Illinois Commerce Comm'n v. Commonwealth Edison Co*., ICC Docket No. 84-0395, Order (Oct. 7, 1987) ("ComEd '87"), at 17." Com Ed Initial Brief at 15. The validation study has not yet occurred. In fact, it is still under consideration, with the vendor and design still unsettled (as of the hearing on August 24, 2016). Tr. at 44:6.

Now is the time that utility management is making the relevant decisions on how to approach VO and how to design and implement its planned validation study. This is the best time to raise concerns about the prudence and reasonableness of the validation

study design so that the utility can make changes to assure that its study is comprehensive, incorporates lessons learned from the Oak Park studies, and is reasonable in cost. ComEd argues that the People "simply express an after-the-fact opinion disagreeing with ComEd's decisions." ComEd Initial Brief at 16. This argument ignores that their testimony (1) is not "after-the-fact" and (2) contains substantial, factual evidence of factors that ComEd should be considering as it designs and implements a multi-million dollar validation study. Messrs. Fagan and Chang identified several key factors that the present study does not appear to address such as:

1. The differences in benefit/cost ratios anticipated by the AEG study, with 73 of 346 substations indicating a benefit/cost ratio in excess of 4.0. AG Ex. 1.0 at 16:6-14. In fact, the AEG study shows benefit/cost ratios as high as 41.81 to 4.03 as well as 150 substations with benefit/cost ratios greater than that of the selected substation (Hayford). 2015 Smart Grid AIPR, App. A at 107-114.[1] This range of benefit/cost ratios demonstrates the variability on the ComEd system and calls into question the decision to test just one substation with a relatively low 2.06 benefit/cost ratio.

2. The different service areas: urban, suburban, rural. *Id*. at 22:3-9. The feeder lengths and other differences in these areas could affect cost and effectiveness of VO approaches and should not be ignored.

3. The different service classes: residential, commercial and industrial. *Id*. at 20:12-15. The AEG Study reported that residential, commercial and industrial customer classes have disparate VO factors, indicating that the mix of these customers can affect both the effectiveness and the possible VO technologies for a particular substation or feeders.[2]

4. The use of radial and network feeder configurations. *Id*. at 20:16-18.

[1] Administrative Notice was taken of this study (Tr. at 20 (Aug. 24, 2016)). It can be found on the Commission's web site at: https://www.icc.illinois.gov/electricity/utilityreporting/InfrastructureInvestmentPlans.aspx - 2015 AIPR Appendix A (https://www.icc.illinois.gov/downloads/public/2015%20AIPR%20Appendix%20A.pdf)

[2] *Id*. at 45-46. The AEG study used Energy VO factors of 0.69, 0.90 and 0.47 for residential, commercial and industrial load, respectively, with Energy VO factors representing the energy savings associated with a 1% change in voltage.

5. The different technologies available to address VO, such as data analytic approaches, capacitor banks and load tap changers, and incorporate batteries and distributed generation, and "model based, rule based, and measurement based approaches." *Id*. at 22:3-9; 20:3-5. The AEG Study discusses twelve "typical" improvements to achieve VO. 2015 Smart Grid AIPR, App. A at 30-31. Yet ComEd has not identified how these improvements would be integrated into the VO validation study, particularly when it is applied to a single substation.

The range of considerations associated with VO, problems confronted when VO was studied in the Oak Park substation (*see* AG Ex. 4.0 at 6-10 & AG Initial Brief at 10, 13-14), and the cost which is proposed to go as high as $574 million, indicate that a study of a single substation and technology does not appear to be reasonable and prudent.

ComEd's current, single substation, 19 feeder project does not allow the utility to validate a VO approach for more than a single service area, residential/ industrial/commercial mix, a single technology and a single, relatively low (2.06) benefit/cost ratio substation. These circumstances face the utility today and were present when the validation study was proposed as projected 2016 plant. The People's witnesses Fagan and Chang provided substantive, factual evidence about VO, and ComEd's argument that they simply offered an "opinion" is just wrong. ComEd relies on its conclusory testimony that its validation study is "representative" and prudent and reasonable without regard to the factors that Messrs. Fagan and Chang identified and discussed.

ComEd also asserts that the validation was not first proposed in this docket and that somehow the Commission should not consider its prudence and reasonableness here. ComEd Initial Brief at 17. However, ComEd witness Michael Moy describes it in ComEd Exhibit 5.0 at page 42. Further, this is the first time that ComEd has sought to

recover the costs of the validation study (although as projected plant, the actual cost will be subject to review on reconciliation). Section 16-108.5 does not insulate ComEd from prudence review because it referred to a validation study in another study (AEG) and in its Annual Infrastructure Progress Reports. Those reports do not evaluate the cost or implementation of ComEd's plans.

The Annual Infrastructure Progress Reports, or AIPRs, and are not a shield against review for reasonableness and prudence. Section 16-108.5(d) expressly authorizes the Commission to review "the prudence and reasonableness of the costs incurred by the utility to be recovered during the applicable rate year" and provides that the "Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act." 220 ILCS 5/16-108.5(d). ComEd's attempt to evade substantive review of its costs by reference to reports should be rejected.

2. Data Analytics. Notwithstanding ComEd's Assertions, The Evidence Demonstrates That It Lacks a Comprehensive Data Analytics/Cloud Computing Strategy, Missing The Opportunity to Use Expanding Data To Cut Costs.

ComEd asserts that its rate base update includes $6.2 million related to its data analytics program. ComEd Initial Brief at 18.[3] ComEd further describes the purported scope of its data analytics/cloud computing efforts as "detailed and complex," and containing a "data platform and five functional domains." *Id.* It is hard to imagine a

[3] While ComEd did not cite this figure, it is found at ComEd Ex. 12.0 at 6:110-111.

data analytics strategy that covers these broad efforts would involve only $6.2 million unless the plan is not being put into operation.

The insignificant size of the spending ComEd identified compared to the spending identified by ComEd witness Jennifer Montague for customer-related operating expenses and rate base assets (including expenses involving managing customer data and AMI systems and data as well as projected 2016 plant additions) demonstrates that ComEd is not pursuing a coordinated data strategy. As presented in the People's Initial Brief at 15-17, Ms. Montague identified $273 million in 2015 investments and $286 million in 2016 investments related to customer operations. ComEd Ex. 4.0 at 17, 19 & 4.02. While the People identified more than $6.2 million related to data analytics[4], both the amounts identified by the People and the investment identified by ComEd are very small and show a lack of commitment to using the expanded data available from its smart grid update to reduce costs and improve operations.

The People also discussed ComEd's spending on cloud based computer technology and data management shown in AG Cross Exhibit 1. People's Initial Brief at 16-17. While those expenditures cover a period of years and are limited to off-premises computing, they do not indicate a much greater commitment to data management[5] than the $6.2 million ComEd presents in its Initial Brief.

While ComEd argues that it has a comprehensive data strategy, its description of that strategy is very general and high level. ComEd Initial Brief at 18. It refers to essentially all of its operations as potentially subject to data analytics strategies (Grid,

[4] People's Initial Brief at 15 citing $20 million for 2015.
[5] AG Cross Exhibit 1 shows spending of $32 million for cloud computing since 2007.

Customer, Business Operations), but only identifies one strategy that has actually been implemented (Smart Energy Services). *Id*. at 18-19. ComEd has not shown that the money it is spending for functions that could be subject to a coordinated data analytics strategy (e.g. information technology, grid operations, business operations, e.g., revenue protection) are part of an overall strategy notwithstanding the substantial costs included in this docket for only the customer operations (including revenue collection and protection, ComEd Ex. 4.0 at 10-15).

While the People do not recommend an adjustment in this docket, this docket includes substantial projected plant that will be subject to reconciliation against actual spending for future recovery from consumers. The investigation and analysis conducted by Messrs. Fagan and Chang raise serious questions about whether ComEd is prudently and reasonably taking advantage of the opportunities for cost savings and operating efficiencies presented by the vast amounts of data becoming available on its system due to its $2.6 billion modernization spending. Requiring reporting so that the Commission can review ComEd's expenditures in information technology, software and data analytics will enable the Commission to determine whether the Company is using these tools prudently and reasonably. The 2016 projected plant additions include substantial spending on customer operations and the issues raised by Messrs. Fagan and Chang create a framework for Commission review of the prudence and reasonableness of ComEd's 2016 projected plant investments when that spending is subject to reconciliation. It also provides a structure for review of future data analytics and information technology spending, while preserving the issues of prudence and reasonableness for future review.

V. Operating Expenses

A. Overview

B. Potentially Uncontested Issues

C. Potentially Contested Issues

1. Telephone Consumer Protection Act ("TCPA") Settlement

ComEd's Initial Brief submits several arguments in response to the AG-recommended disallowance of the TCPA settlement at issue in this case. In sum, the Company claims that (1) the TCPA settlement was prudent, given the potential financial liability; (2) that Mr. Brosch's proposed disallowance amounts to an impermissible "hindsight" review of actions taken at the time the decision was made to alter the Outage Alert program from a specifically termed opt-in protocol to an opt-out design; and (3) that FCC rulings supported the decision to suddenly switch enrollment in the program to an opt-out basis when customers had been told the opposite. As discussed below, each of these arguments is not supported by the record evidence or legal holdings, and makes clear that the Company failed in its burden under Section 16-108.5 and 9-201 of the Public Utilities Act to demonstrate that the TCPA settlement expense was prudently incurred.

a. Mr. Brosch's disallowance recommendation was based on ComEd's sudden, unexplained switch to an opt-out enrollment protocol when customers had been led to believe that the program was an opt-in design – not a hindsight review based on new facts, as ComEd suggests.

ComEd asserts in its Initial Brief, as its rebuttal to the OAG-recommended $2.2 million TCPA settlement disallowance, that AG witness Michael Brosch's recommendation is "based on his after-the-fact opinion" that ComEd imprudently acted when it reversed course on sending text messages for an outage alert program on an *opt-out* basis, when customers had been specifically told that the program was of an *opt-in* design. ComEd Initial Brief at 34. This characterization is a red herring, as the Company seeks to imply that Mr. Brosch was applying some impermissible, hindsight prudence review of the actions taken by applying facts that are available today, not permitted under Illinois law. *Id.* at 42. That characterization is both inaccurate and misleading.

The facts that should guide the Commission's evaluation of the issue are these. The record evidence shows that the Company originally designed its Outage Alert Program in January 2012 as an opt-in service, whereby customers could register their cell phone numbers in the Program via ComEd's website. AG Ex. 1.3 (ComEd response to AG 13.02(d)); AG Ex. 1.4, ComEd Response to AG 5.03, Attachment 2. ComEd states, "After making changes and improvements to the Program, ComEd decided to include subscription into the Program as part of its standard electric service on an 'opt-out' basis in the fall of 2013." AG Ex. 1.3. The litigation that triggered the settlement expense was prompted when ComEd sent customers a text message informing them that the program was now structured as an opt-out service. AG Ex. 1.4A, ComEd Response to AG 5.03, Attachment 2. ComEd likewise admitted that this change – the decision to send text messages to all customers, when they had specifically been invited to participate in the program on an opt-in basis -- created financial exposure for ratepayers and Company shareholders of $600 million to $1.8 billion. AG Ex. 1.3. There can be no doubt that

"ComEd unilaterally enrolled thousands of Illinois residents without their consent or permission", as alleged in the complaint that triggered the settlement. AG Ex. 1.4A, ComEd Response to AG 5.03, Attachment 2.

Mr. Brosch's conclusion that this was imprudent behavior was not based on any sort of hindsight assessment applying facts or case law known today. The adjustment was based on the facts cited above. In addition, ComEd's own evidence in support of the expense supports Mr. Brosch's opinion. For example, ComEd witness Polek-O'Brien herself admitted in testimony that "the manner in which the court would interpret the consent argument was uncertain and no binding legal precedent addressed the emergency purpose defense." ComEd Ex. 11.0 (Polek-O'Brien Rebuttal) at 4. Given this admission and that the lawsuit was filed nearly a full year after ComEd decided in the fall of 2013 to reverse course and include enrollment into the Program as part of its standard electric service on an 'opt-out' basis, there clearly was "no binding legal precedent" addressing the emergency purpose defense at the time the change in protocol decision was made.

Indeed, ComEd never justified why that unilateral decision was made, notwithstanding that the Company originally designed its Outage Alert Program in January 2012 as an opt-in service, whereby customers could register their cell phone numbers in the Program via ComEd's website. AG Ex. 1.3 (ComEd response to AG 13.02(d)); AG Ex. 1.4, ComEd Response to AG 5.03, Attachment 2. And, importantly, even if ComEd could point to an emergency purpose defense at the time the text was sent, which they could not, the particular text messages that triggered the filing of the lawsuit were *not* sent for emergency purposes, and did not provide notification of an outage or emergency of any kind. *Id.*

Thus, ComEd's assertion that Mr. Brosch's adjustment constituted an impermissible hindsight analysis of the decision to alter the program and send texts *en masse* to its customers should be rejected.

b. ComEd's reliance on a 1992 FCC decision related to TCPA provisions as support for their request for recovery of the TCPA settlement is misplaced.

In its Brief, ComEd asserts that it "reviewed the applicable law and analyzed the change from opt-in to opt-out and reasonably believed that the change did not pose a substantial risk of liability." ComEd Initial Brief at 39. It claims it "weighed the pros and cons" and "chose the path that would allow it to reach many more customers with this effective desirable and valuable emergency safety service." *Id.* The law it relies on was a 1992 FCC Order that, according to ComEd, "plainly stated that outage-related communications by power companies" are "within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior consent." ComEd Brief at 39, citing *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 7 FCC 8752 (Oct. 16, 1992) ("1992 FCC Order"). This argument is not persuasive for a couple of reasons.

First, ComEd's purported basis for its understanding of the law related to sending a cell phone text *predated* the ubiquitous arrival of cell phones as we know them today, not to mention the ability to text. *See* AG Ex. 1.4A, ComEd Response to AG 5.03, Attachment 2. ComEd simply should not have relied upon a 20-year-old decision that did not address the fact that sending a text message would cause cell phone users to either pay their wireless service providers for each text message call they receive or incur a

usage allocation deduction to their test messaging plan, regardless of whether the message is authorized, as a basis for sending the texts.

Second, the 1992 decision that ComEd states formed the basis of their assumption that sending the texts *en masse* was prudent was a ruling that clearly states "amended rules and regulations to establish procedures for avoiding unwanted telephone solicitations to *residences,* and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. 1992 FCC Order at 1. There is no indication that the decision applies to cell phone text messages or that it addressed the financial implications of sending such texts. In addition, the emergency purpose utility exemption that ComEd asserts the Order clarifies also specifically references calls made to residences – not customer cell phones. *Id.* at par. 51.

In addition, even if the 1992 FCC could be viewed as providing cover for ComEd's decision to switch unannounced to an opt-out program design, the fact remains that the text at the center of the litigation and settlement was *not* an outage alert message. It was a message that informed customers (who had been previously told that the program was an opt-in program) that the program was now an opt-out protocol. That decision, as ComEd plainly admits, opened the Company's shareholders and ratepayers up to a potential $600 million to $1.8 billion liability.[6]

In its Brief, ComEd further argues that it believed the TCPA was designed to address telemarketing calls, and that the decision to switch to an opt-out protocol was prudent "particularly when the customers voluntarily provide their cell phone numbers".

[6] *See* AG Ex. 1.4, ComEd Response to AG 13.02(d).

ComEd Initial Brief at 39. But ComEd omits the point that in fact its customers had been previously told by ComEd that the program was an opt-in program. Clearly, customers had not provided consent under those circumstances. Again, it points to the fact that making such an assumption was imprudent in light of the extreme financial liability created by the decision. *See* AG Ex. 1.4, ComEd Response to AG 13.02(d).

As noted in the AG Initial Brief, only prudently incurred expenses are recoverable in rates. *BPI II,* 146 Ill.2d at 275. Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. *Illinois Power Co. v. Illinois Commerce Comm'n,* 245 Ill.App.3d 367, 371, 612 N.E.2d 925, 929 (1993). Relying on a 1992 decision that did not address the financial implications of text messaging as a basis for switching a previously identified opt-in program to an opt-out program, and sending millions of customers a text message notifying them of that change, thereby exposing the Company to significant financial liability, did not constitute prudent action such that the ramifications of that action should be paid for by customers.

For all of these reasons, ComEd's reliance on the 1992 FCC decision is not a basis for concluding that ComEd acted prudently at the time it altered the enrollment protocol and sent the *en masse* texts, and that ratepayers should pay for the resulting settlement expense.

c. The prudence of ComEd's decision to settle the TCPA claim is not the issue at hand.

In its Brief, ComEd notes that the "Commission has long encouraged settlements and allows recovery of prudent and reasonable settlement amounts included in a utility's

revenue requirement." ComEd Initial Brief at 35. The Company argues that settling the class action lawsuit for $5 million was prudent given the Company's financial exposure of $600 million to $1.8 billion. *Id.* at 36. But whether it was prudent to settle the case, given the financial exposure, is not at issue, and certainly is not the basis for Mr. Brosch's proposed disallowance, as noted above and in the AG Initial Brief.

More relevant is the fact that Ms. O'Brien acknowledged that "the manner in which the court would interpret the consent argument was uncertain and no binding legal precedent addressed the emergency purpose defense." *Id.* at 4. She also stated that literature published around the time the opt-out change was made "indicates that any TCPA lawsuit is 'a destructive force' that can threaten a company with 'annihilation' for actions that caused no real harm to consumers." *Id.* at 5. Assuming these as facts, as well as the facts of the initial set-up of the program, points to a conclusion that ComEd acted imprudently in risking potential TCPA lawsuits through their program re-design and texting action.

The fact is that relying on a 1992 FCC decision, as ComEd apparently did, to suddenly send millions of texts to customers who had been told that the program was an opt-in program, without a clear understanding of the implications of that action relative to the TCPA, was the act that should be evaluated. And those decisions were both reckless and imprudent, as noted above and in the AG's Initial Brief.

d. A recent FCC Ruling supports Mr. Brosch's conclusion that ComEd's actions related to the Outage Alert Program were imprudent.

ComEd asserts in its Brief that another FCC decision – this one from August 5, 2016 – supports its decision to alter the program and send the texts. ComEd Initial Brief at 40, citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Edison Electric Institute ("EEI") and American Gas Association's Petition for Expedited Declaratory Ruling,* CG Docket No. 02-278 ("FCC 2016 TCPA ruling"). This argument, too, fails.

As noted the AG Initial Brief, in that decision, the FCC tailored the relief requested by EEI, which had requested that the Commission confirm, under the TCPA, that providing a wireless telephone number to an energy utility constitutes "prior express consent" to receive, at that number, non-telemarketing, informational calls related to the customer's utility service. FCC TCPA ruling, at 5, par. 9. The FCC did *not* reach the question of whether the communications sent by utility companies to their customers would fall within the TCPA's "emergency purpose" exception.

Again, in its decision, the FCC clarified that "consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided 'instructions to the contrary.'" FCC Ruling at 13,

par. 29. In doing so, however, the FCC made clear that this was not a "blanket exemption from the TCPA for utility companies." *Id.* at 14, par. 30.

In addition, as noted in the AG Initial Brief, the decision is in fact less than helpful to ComEd's case. First, the decision was issued more than three years after ComEd altered its opt-in program, and has no retroactive application. As noted earlier, too, hindsight review – in this instance, applying the June, 2016 FCC ruling to action taken in the fall of 2013 -- is impermissible. *Illinois Power Co.*, 245 Ill.App.3d at 371. Even if did carry weight in the Commission's analysis, however, the ruling in fact *supports* Mr. Brosch's conclusion that the program change and subsequent texting needlessly exposed ComEd shareholders and customers to financial risk.

Specifically, in clarifying its ruling, the Commission went provided clear instructions to utilities on the issue of ensuring consent:

> To ensure that utility companies call only those consumers who have consented to receive autodialed and prerecorded calls and that such calls are closely related to the provision of service, *we conclude that the utility company should be responsible for demonstrating that the consumer provided prior express consent as it is in the best position to keep records in the usual course of business showing such consent, and the utility company will bear the burden of showing it obtained the necessary prior express consent. In this regard, we strongly encourage utility companies, and all robocallers, to inform customers during the service initiation process or when updating contact information on the account as an additional safeguard that, by providing a wireless telephone number to them, the customer consents to receiving autodialed and prerecorded message calls at that number, to the extent such calls are closely rated to the service purchased by the customer.* This additional safeguard will also help ensure that certain "vulnerable" wireless cell phone customers with limited minutes are afforded opportunities at that time to limit calls to their devices if needed.

FCC Ruling at 14, par. 31 (emphasis added, footnotes omitted). Applying this guidance to the facts at issue, ComEd not only cannot show such "express consent" but also admits that its customers who supplied phone numbers prior to the change in program were informed by the company that the program was an opt-in service. In this regard, ComEd would have failed to demonstrate to a court that prior consent had been provided by customers who supplied cell phone numbers. It should be noted, too, that ComEd's program remains an "opt-in" service at this time, notwithstanding the FCC's decision. AG Cross Exhibits 5, 6 (ComEd Response to AG 19.01, 19.02).

* * *

For all of the reasons discussed above, the Commission should adopt Mr. Brosch's proposed disallowance. The People recommend that the Commission remove $2,281,456 of expense associated with ComEd's settlement of the Telephone Consumer Protection Act complaint, reducing the 2017 net revenue requirement by $4,889,037, and reducing the increase to $130,407,963. (*See* AG Initial Brief at 7.)

VI. Rate of Return

VII. Revenues

VIII. Cost of Service and Rate Design

IX. Other Findings

X. Conclusion

WHEREFORE, the People of the State of Illinois respectfully request that the Commission enter a Final Order consistent with the recommendation in this Reply Brief and the AG Initial Brief.

Respectfully submitted,

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